

No. 57684-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID R. LUCERO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable James H. Allendoerfer

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. <u>SUMMARY OF ARGUMENT</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	2
D. <u>STATEMENT OF THE CASE</u>	3
E. <u>ARGUMENT</u>	6
1. THE TRIAL COURT VIOLATED LUCERO'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY FAILING TO PROPERLY INSTRUCT THE JURY ON DEFENSE OF ANOTHER.....	6
a. Jury instructions on defense of another must more than adequately convey the law	6
b. The jury instructions did not adequately convey the subjective standard of imminent harm	8
i. Instructions on defense of another must more than adequately inform the jury of the correct subjective standard of imminent harm.....	8
ii.. The jury instructions misstated the standard of imminent harm.....	14
iii. The manifest constitutional error in the jury instructions requires reversal of the conviction.....	16
c. The trial court erred in failing to instruct the jury Lucero had no duty to retreat.....	18
i. A no duty to retreat instruction is required if the jury could conclude that flight was a reasonable alternative to use of force to defend another	19
ii. The court should have instructed the jury that Lucero had no duty to retreat	21

iii. Reversal is required	22
2. THE COURT ERRED IN INCLUDING TWO CALIFORNIA PRIOR CONVICTIONS IN LUCERO'S OFFENDER SCORE	23
a. The facts necessary to establish an out-of-state conviction is comparable to a Washington offense are essential elements that must be proved to a jury beyond a reasonable doubt	24
b. Lucero had a right to have a jury determine, beyond a reasonable doubt, the facts necessary to establish comparability of two of his prior California convictions...	29
i. Second degree burglary offense	29
ii. Possession of a controlled substance offense.....	31
c. The court erred in including the two California convictions in Lucero's offender score	33
i. A court may not include a foreign conviction in an offender score without determining conclusively the relevant facts were proved to a jury or admitted by the defendant in a guilty plea.....	33
ii. The sentence must be reversed, as Lucero did not waive his constitutional right to a jury trial	35
iii. <i>State v. Ross</i> does not compel a different outcome .	39
F. <u>CONCLUSION</u>	42

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 21	24
Const. art. I, § 22	24
Const. art. I, § 3	6, 24
U.S. Const. amend. 6.....	24
U.S. Const. amend 14.....	1, 2, 6, 24, 28, 34

Washington Supreme Court Cases

<u>Bellevue v. Acrey</u> , 103 Wn.2d 203, 691 P.2d 957 (1984)	36, 38
<u>State v. Acosta</u> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	7
<u>State v. Allery</u> , 101 Wn.2d 591, 682 P.2d 312 (1984)	19
<u>State v. Barton</u> , 93 Wn.2d 301, 609 P.2d 1353 (1980)	35
<u>State v. Cantu</u> , 156 Wn.2d 819, 132 P.3d 725 (2006)	30
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	27, 39, 40
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993)	9
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996)	9
<u>State v. Lopez</u> , 147 Wn.2d 515, 55 P.3d 609 (2002)	27
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998)	26, 27, 28, 29, 31
<u>State v. Penn</u> , 89 Wn.2d 63, 568 P.2d 797 (1977)	9, 19
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003)	20, 21, 22
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004)	38, 40, 41
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003)	26

<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994)	7
<u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994)	36
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999)	19, 21
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997)	7, 8, 10, 11, 13, 16, 17
<u>State v. Wheeler</u> , 145 Wn.2d 116, 34 P.3d 799 (2001)	26
<u>State v. Wicke</u> , 91 Wn.2d 638, 591 P.2d 452 (1979)	36, 37, 38

Washington Court of Appeals Cases

<u>State v. Bernardy</u> , 25 Wn. App. 146, 605 P.2d 791 (1980)	9
<u>State v. Brand</u> , 55 Wn. App. 780, 780 P.2d 894 (1989)	36
<u>State v. Bunting</u> , 115 Wn. App. 135, 61 P.3d 375 (2003)	28
<u>State v. Crigler</u> , 23 Wn. App. 716, 598 P.2d 739 (1979)	9
<u>State v. Farnsworth</u> , __ Wn. App. __, 130 P.3d 389 (2006)....	28, 35
<u>State v. Hochhalter</u> , 131 Wn. App. 506, 128 P.3d 104 (2006)	39
<u>State v. Hunter</u> , 116 Wn. App. 300, 65 P.3d 371 (2003), <u>aff'd by</u> <u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004)	40
<u>State v. Jackson</u> , 129 Wn. App. 95, 117 P.3d 1182 (2005)	40, 41
<u>State v. Marquez</u> , 131 Wn. App. 566, 127 P.3d 786 (2006)	7, 8, 11, 12, 13, 14, 15, 17, 18
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004)	8, 10, 11, 14, 15, 18
<u>State v. Walker</u> , 13 Wn. App. 545, 536 P.2d 657 (1975)	9
<u>State v. Wooten</u> , 87 Wn. App. 821, 945 P.2d 1144 (1997) 20, 21, 22	

United States Supreme Court Cases

<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, S.Ct. 1219, 140 L.Ed.2d 350 (1998)	26
<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)	36, 38
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	17
<u>In re Winship</u> , 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)	6, 25
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	35, 36
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)	17
<u>Washington v. Recuenco</u> , ___ U.S. ___, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)	25, 28, 31

Statutes

Former RCW 69.50.101 (1984)	32
Former RCW 69.50.401(e) (1971)	32
RCW 9.94A.030	25, 26
RCW 9.94A.530	26, 39
RCW 9A.16.020	8
RCW 9A.52.010	30
RCW 9A.52.100	30

Other Authorities

Cal. Health & Safety Code § 11006.5	32
Cal. Health & Safety Code § 11007	32

Cal. Health & Safety Code § 11054(d)(13)	32
Cal. Health & Safety Code § 11357	32
Cal. Health & Safety Code § 11362	32
Cal. Penal Code § 459.....	30
Cal. Penal Code §460.....	30
<u>State v. Brown</u> , 129 P.3d 947, 2006 Ariz. LEXIS 25 (Ariz. 2006)..	37

A. SUMMARY OF ARGUMENT

In this appeal of his conviction for assault with a deadly weapon in the second degree, David Lucero contends the jury instructions did not adequately convey the law regarding defense of another, requiring reversal of the conviction. Lucero also contends his sentence must be reversed, as the court erroneously included two out-of-state prior convictions in his offender score without determining whether the facts necessary to show comparability of the offenses were proved to a jury beyond a reasonable doubt or admitted in the course of a guilty plea.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Lucero's constitutional right to due process of law, as the jury instructions on defense of another misstated the standard of imminent harm.

2. The trial court violated Lucero's constitutional right to due process of law by failing to instruct the jury that Lucero had no duty to retreat.

3. The trial court violated Lucero's Sixth Amendment right to trial by jury and due process right to proof beyond a reasonable doubt by including two prior California convictions in his offender score without determining whether the facts necessary to show

comparability of the offenses were proved to a jury beyond a reasonable doubt or admitted in the course of a guilty plea.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the defendant presents evidence he justifiably used force in defense of another, due process requires the State prove the absence of the defense beyond a reasonable doubt. Jury instructions that do not adequately convey the law of defense of another relieve the State of its burden of proof. Here, the jury instructions did not adequately inform the jury that Lucero was entitled to use deadly force to repel a battery, as long as he reasonably believed based on circumstances known to him that the battery might result in great personal injury. Did the erroneous instruction relieve the State of its burden of proof?

2. A person does not have a duty to retreat prior to using force to defend another if he is lawfully situated. Where a jury might erroneously conclude the defendant should have retreated rather than use force to defend another, the trial court must instruct the jury the defendant had no duty to retreat. Where Lucero was lawfully situated and the facts show he could have retreated, did the court err in failing to instruct the jury he had no duty to retreat?

3. Where the elements of a prior out-of-state conviction are not comparable to a Washington offense, the defendant's actual conduct underlying the offense must violate a Washington statute. Because those facts do not fall under the "prior conviction" exception to Apprendi, the facts are elements of the present offense that must be proved to a jury beyond a reasonable doubt. Where the State failed to prove and the court failed to find the relevant facts had been proved to a jury beyond a reasonable doubt, and Lucero did not waive his right to a jury determination of the facts, did the court err in including the prior offenses in the offender score?

D. STATEMENT OF THE CASE

On the afternoon of June 20, 2005, David Tegen discovered his girlfriend Karissa McGaa's father, Jeff McGaa, had reportedly hit the couple's son in the face. RP 56, 78. Tegen was frustrated and became increasingly upset as he discussed the incident with family members. RP 56, 79.

Eventually, Tegen called McGaa from Mary Martin's house to discuss the incident. RP 61, 227. Tegen became upset on the telephone as McGaa cursed at him. RP 229. Family members could hear McGaa yelling at Tegen through the telephone receiver.

RP 229. Eventually McGaa told Tegen he was coming over to the house. RP 230. Tegen conveyed this information to the family members who were present. RP 230. Lucero was not present, however, as he was sleeping in the garage. RP 230.

Tegen asked his girlfriend's brother, Billy Richards, to assist him if he were knocked down by McGaa. RP 64. Tegen then went into the garage and spoke to Lucero, informing him that McGaa was coming over. RP 63. Lucero was concerned that violence might result from the encounter. RP 63. Lucero was aware that McGaa had a history of violent behavior. RP 107, 184, 230.

About five minutes later, McGaa arrived at the Martin household. RP 324. Several family members testified that as McGaa exited his truck and walked to the front walkway, he had on a pair of gloves. RP 185, 233, 386. Karissa McGaa testified she recognized these gloves as a pair of gloves lined with metal that McGaa had previously offered to her for protection. RP 239.

As McGaa approached Tegen, he punched Tegen in the face, knocking him to the ground. RP 65-66. Lucero then exited the garage yelling, "What are you doing? Why are you doing this?" RP 66. Lucero intervened and began punching McGaa. RP 66.

After the first few punches, family members were able to break up the fight. RP 241, 428, 457.

Although McGaa was stabbed three times during the fight, no witnesses could testify to seeing a knife in either Lucero or Tegen's hands during the fight. RP 332, 386, 443, 456.

Lucero was arrested at the scene for assaulting McGaa. RP 104-06. While en route to the police station, Lucero stated he was in the house when Tegen approached him to say McGaa was coming over to fight. RP 107. Lucero said when he came outside, he saw the fight in progress and tried to break it up. RP 107. He said he did not have a knife. RP 107.

Mr. Lucero was charged with assault with a deadly weapon in the first degree. CP 68. At trial, the jury was instructed on Lucero's defense theory, defense of another. CP 18-21. The jury found Lucero not guilty of first degree assault, but guilty of the lesser-included offense of second degree assault. CP 35-36. The jury also returned a special verdict, finding Lucero was armed with a deadly weapon during the commission of the assault. CP 34.

E. ARGUMENT

1. THE TRIAL COURT VIOLATED LUCERO'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY FAILING TO PROPERLY INSTRUCT THE JURY ON DEFENSE OF ANOTHER

Jury instructions on defense of another must more than adequately convey the law. Where jury instructions relieve the State of its burden of disproving the defense beyond a reasonable doubt, a manifest constitutional error has occurred that is presumed prejudicial. Here, the combined jury instructions were erroneous, as they misinformed the jury regarding the degree of harm the defendant must believe is imminent before he is justified in using force to defend another. Further, the court erred in failing to instruct the jury Lucero had no duty to retreat. Because these errors relieved the State of its burden of disproving the defense, the conviction must be reversed.

a. Jury instructions on defense of another must more than adequately convey the law. Constitutional due process requires the State prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend 14; Const. art. 1, §3; In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). When the defendant raises the issue of defense of

another, the absence of the defense becomes another element of the offense the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984); State v. Marquez, 131 Wn. App. 566, 575, 127 P.3d 786 (2006). A jury instruction misstating the law of defense of another relieves the State of its burden of disproving the defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); Marquez, 131 Wn. App. at 576.

A criminal defendant is “entitled to have the jury fully instructed on the defense theory of the case,” provided the instruction accurately states the law and is supported by evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions on defense of another “must more than adequately convey the law.” Walden, 131 Wn.2d at 473; Marquez, 131 Wn. App. at 575. The “jury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror, especially with respect to the legal parameters applicable to defense of another.” Marquez, 131 Wn. App. at 575-76 (citing Walden, 131 Wn.2d at 473). A jury instruction misstating the law of defense of another is an error of constitutional magnitude, presumed to be prejudicial, which may be raised for the first time on

appeal. Walden, 131 Wn.2d at 473; Marquez, 131 Wn. App. at 576.

b. The jury instructions did not adequately convey the subjective standard of imminent harm.

i. Instructions on defense of another must more than adequately inform the jury of the correct subjective standard of imminent harm. The use of force against another is lawful under certain circumstances. RCW 9A.16.020(3). The law allows defense of another person against a less-than-life-threatening assault, so long as the degree of force the defendant uses is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to that defendant. Walden, 131 Wn.2d at 473; Marquez, 131 Wn. App. at 575; State v. Rodriguez, 121 Wn. App. 180, 186, 87 P.3d 1201 (2004). Thus, in considering a claim of defense of another, the jurors must place themselves in the shoes of the defendant. All facts and circumstances known to the defendant at the time of the assault should be considered.

The jury should consider not only the immediate circumstances surrounding the assault, but those occurring substantially beforehand. State v. Crigler, 23 Wn. App. 716, 719,

598 P.2d 739 (1979). Whether the victim's conduct constitutes a threat must be evaluated in light of the defendant's perceptions, based on the entire relationship between the defendant and the victim. State v. Janes, 121 Wn.2d 220, 241-42, 850 P.2d 495 (1993). In assessing how the circumstances appeared to the defendant, the jury may consider whether the victim had a reputation for violence and whether the defendant was aware of that reputation. State v. Walker, 13 Wn. App. 545, 549, 536 P.2d 657 (1975).

The jury must consider the circumstances as they appeared to the defendant, not those that actually existed. Thus, for instance, a person may use force to act in defense of another if he reasonably believes the other person is the innocent party and in danger even if, in fact, the party whom he is protecting was the aggressor. State v. Bernardy, 25 Wn. App. 146, 148, 605 P.2d 791 (1980); State v. Penn, 89 Wn.2d 63, 66, 568 P.2d 797 (1977).

Defense of another requires only a "subjective, reasonable belief of imminent harm from the victim." State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The jury need not find actual imminent harm. Id. The instructions should allow the jury to put themselves in the defendant's shoes and from that perspective

determine the “reasonableness from all the surrounding facts and circumstances as they appeared to the defendant.” Id. at 900.

A person may justifiably use deadly force in self-defense or defense of another against an unarmed assailant, depending on the circumstances as they appeared to the defendant. If the defendant subjectively and reasonably believed the person under attack was in imminent danger of great personal injury, the defendant may use a deadly weapon to repel the threatened attack. Walden, 131 Wn.2d at 477-78. Thus, the defendant may use deadly force to repel even an ordinary battery, as long as he reasonably believed, based on the circumstances known to him, that the battery might result in great personal injury. Id. at 477. “Great personal injury” means “an injury that the [defendant] reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the [defendant] or another person.” Id. at 477-78 (citation omitted). The jury instructions must make this subjective standard manifestly apparent to the average juror. Id. at 473-74.

In State v. Rodriguez, Division Three of this Court addressed the error arising out of a combination of jury instructions involving self-defense. The trial court in Rodriguez instructed the jury that a

person is entitled to use force “if that person believes in good faith and on reasonable grounds that he is in actual danger of *great bodily harm*.” 121 Wn. App. at 185. The court also separately defined great bodily harm, in the context of the instructions on first degree assault, as “bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement.” Id. at 186.

The Rodriguez Court held that the self-defense instruction, together with the definition of great bodily harm as part of the court’s instructions on first-degree assault, required the jury “to find that [Rodriguez] was scared of death or at least permanent injury. And that is not the test.” Id. at 187. Like the instructions found objectionable in Walden, these instructions, by defining “great bodily harm” to exclude ordinary batteries, could prevent a reasonable juror from considering whether the defendant was justified in using force to repel the battery at issue. 121 Wn. App. at 186 (citing Walden, 131 Wn.2d at 477).

More recently, in State v. Marquez, Division Two of this Court addressed a similar error arising in a case of defense of another. In that case, witnesses testified Logan Marquez hit Brian Morseburg in the head with a flashlight after Morseburg punched

Marquez's girlfriend twice and before he could hit her a third time. 131 Wn. App. at 569. Morseburg fell to the ground, hitting his head on the hard paved surface and suffered a severe head injury. Id. Marquez was charged with first degree assault with a deadly weapon, the flashlight. Id. at 570.

Using instructions nearly identical to the instructions in the present case, the trial court in Marquez informed the jury of the elements of first degree assault,¹ the lesser included charge of second degree assault, the definition of great bodily harm,² and defense of another.³ 131 Wn. App. at 571-72. As in this case, the

¹ The instruction on first degree assault stated:

To convict the Defendant, Logan Justice Marquez, of the crime of assault in the first degree as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

. . .

(2) That the Defendant, Logan Justice Marquez, acted with intent to inflict *great bodily harm*;

(3) That the assault (a) was committed with a deadly weapon or by force or means likely to produce *great bodily harm* or death; or (b) resulted in the infliction of *great bodily harm*; . . .

Marquez, 131 Wn.App. at 571 (emphasis added).

² The instruction on great bodily harm stated:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement . . .

Id. at 572.

³ The instruction on defense of another stated:

A person is entitled to act on appearances in defending another, if that person believes in good faith and on reasonable grounds that another is in actual danger of *great bodily harm*, although it afterwards might

jury convicted Marquez of the lesser included offense, second degree assault while armed with a deadly weapon. Id.

As in Rodriguez, Division Two found the combined instructions in the absence of a separate instruction defining great bodily harm in the context of defense of another, “improperly increased the likelihood of Marquez’s conviction” and were an incorrect statement of the law. Id. at 576. The court held the jury could have been misled to believe that Marquez could use force to defend another only if he reasonably believed the other person was in danger of being killed or of suffering from serious permanent disfigurement or impairment. Id. Instead, the correct statement of the law is that the defendant may use force to repel even an ordinary battery, if the defendant subjectively and reasonably believes the assault threatens great personal injury. Id. at 576-77.

The problem with the instructions identified in Walden, Rodriguez, and Marquez is created by the elevation of the standard of imminent harm. As the court explained in Walden, “[d]eadly force may be used . . . in self-defense if the defendant reasonably believes he or she is threatened with death or ‘great personal

develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

Id.

injury.” Walden, 131 Wn.2d at 474. This standard is lower than the standard for “great bodily harm” as defined in the context of first degree assault. Rodriguez, 121 Wn. App. at 187. Use of the phrase “great personal injury” in jury instructions, rather than the term “great bodily harm,” would prevent the erroneous elevation of the standard of defense of another in cases where the phrase “great bodily harm” is defined in the context of first degree assault.

ii. The jury instructions misstated the standard of imminent harm. As in Rodriguez and Marquez, the trial court misstated the law on defense of another by providing only one definition of great bodily harm. The court instructed the jury on the elements of first degree assault and defined great bodily harm within that context. CP 48, 54. The court directed the jury in Instruction 9:

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 20th day of June, 2005, the defendant assaulted Jeffrey McGaa;

(2) That the assault was committed with:

(a) a deadly weapon

OR

(b) by a force or means likely to produce
great bodily harm; and

(3) That the defendant acted with intent to
inflict *great bodily harm*;

CP 48 (emphasis added). The court then defined *great bodily harm*

in Instruction 15, which stated:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 54 (emphasis added).

The court then gave a series of instructions on defense of another. CP 57-60. Instruction 21 informed the jury:

A person is entitled to act on appearances in defending another, if that person believes in good faith and on reasonable grounds that another is in actual danger of *great bodily harm*, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 60 (emphasis added).

Similar to Rodriguez and Marquez, the combination of jury instructions here misled the jury because great bodily harm was defined only within the context of first degree assault. By inserting the term “great bodily harm” into the defense of another instruction, “the jury was required to find that [the defendant] was scared of

death or at least permanent injury. And that is not the test.”

Rodriguez, 121 Wn. App. at 187.

In its closing statements to the jury, the State specifically brought Instruction No. 21 to the jury’s attention. RP 693-94. The State read aloud the instruction and then paraphrased stating, “[s]o, Mr. Lucero had to be concerned that Mr. Tegen was in danger, appeared to be in danger of great bodily harm.” RP 694. The prosecutor thus impermissibly encouraged the jury to conclude Lucero did not act with lawful force because Tegen did not appear to be in danger of death or disfigurement.

Jury instructions on defense of another must make the relevant standard manifestly apparent to the average juror when taken as a whole. Walden, 131 Wn.2d at 473. Here, the jury instructions, as a whole, are misleading to the average juror. They instruct the jury to find Lucero acted lawfully only if he believed Tegen was in danger of death or permanent disfigurement.

iii. The manifest constitutional error in the jury instructions requires reversal of the conviction. A jury instruction misstating the law of defense of another is presumed prejudicial. Walden, 131 Wn.2d at 473; Marquez, 131 Wn. App. at 791. The State must prove the error was harmless beyond a reasonable

doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

When an error in a jury instruction relieves the State of its burden of proving an essential element of the crime, the error can be deemed harmless only if that element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). But if the defendant contested the element and raised evidence sufficient to support a contrary finding, the reviewing court cannot find the error harmless. Neder, 527 U.S. at 19.

Here, the trial court properly determined there was sufficient evidence presented on defense of another to entitle Lucero to a jury instruction on the defense. Evidence was presented that Lucero knew McGaa was coming to the Martin residence to fight, and that he was aware McGaa had a history of violence. Witnesses also testified McGaa was wearing lead lined gloves when he arrived at the house, and that he threw the first punch knocking Tegen to the ground. Lucero made statements to police after his arrest supporting this theory. He stated he saw the fight begin and tried to break it up. RP 107. Based on these facts, a reasonable juror

could have determined that Lucero subjectively and reasonably believed Tegen was in imminent danger of great personal injury, even if not “great bodily harm.”⁴

Whether Mr. Lucero subjectively and reasonably believed Tegen was in danger of great personal injury was a question for the jury to decide. Marquez, 127 P.3d at 792. However, as a result of the erroneous jury instructions, the jury could not consider this critical issue. Instead, the jury was presented with a higher standard of defense of another. The jury was required to find the use of force was unreasonable if it found the punch by McGaa did not place Tegen in danger of being killed or seriously and permanently disfigured. But that is not the test. Rodriguez, 121 Wn. App. at 187. The error is not harmless and the conviction must be reversed.

c. The trial court erred in failing to instruct the jury Lucero had no duty to retreat. A person does not have a duty to retreat prior to using force to defend another if he is lawfully situated, even if retreat is a viable option. Where a jury might erroneously conclude that the defendant should have retreated rather than use force to defend another, the trial court must instruct

⁴ The initial assault against Tegen by McGaa was so forceful that six months after the fight, Tegen still suffered eye damage. RP 192.

the jury the defendant had no duty to retreat. Failure to provide such an instruction is reversible error. Because the jury might have erroneously concluded in this case, based on the evidence and the instructions provided, that Lucero should have retreated rather than used force, the conviction must be reversed.

i. A no duty to retreat instruction is required if the jury could conclude that flight was a reasonable alternative to use of force to defend another. It is well established that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be.⁵ State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). An instruction should be given to this effect when sufficient evidence is presented to support it. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984).

In determining whether a defendant is entitled to an instruction he had no duty to retreat, the issue is whether the jury might erroneously conclude the defendant should have retreated rather than use force in defense of another. State v. Redmond, 150 Wn.2d 489, 493-94, 78 P.3d 1001 (2003). If the evidence shows the defendant *could* have retreated, the jury should be instructed that the law does not require a person to retreat when he or she is

assaulted in a place where he or she has a right to be. Id. at 494-95.

In State v. Wooten, Wooten claimed she was acting in self-defense when she shot into a car driven by a person who had moments before threatened to kill her. 87 Wn. App. 821, 823-24, 945 P.2d 1144 (1997). Wooten became fearful after the threat and went inside the home to retrieve a firearm. Id. Wooten claimed she then approached the car with an intent to defuse the situation, but armed herself with a gun in case she needed to defend herself. Id. As she approached to car, the driver appeared to reach for a gun, and Wooten fired hitting the passenger. Id.

As in this case, the trial court in Wooten instructed the jury that force used in self-defense is justified only when the force used is necessary. Id. at 824. Force was defined as necessary when “no reasonably effective alternative . . . appeared to exist and . . . the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.” Id. On appeal, the court held the failure to give a “no duty to retreat” instruction was reversible

⁵ In the case of defense of another, the defendant stands in the shoes of the person he seeks to defend. State v. Penn, 89 Wn.2d 63, 65, 568 P.2d 797 (1977).

error, as the jury could have erroneously concluded that flight was a reasonable alternative to the use of force. Id. at 826.

ii. The court should have instructed the jury that Lucero had no duty to retreat. Here, a “no duty to retreat” jury instruction was supported by the evidence. At the time of the assault, Lucero was living at the house where the incident occurred. Thus, he had a right to be there and no duty to retreat. Studd, 137 Wn.2d at 549. Further, the evidence shows Lucero *could* have retreated, by returning into the house, for instance. Thus, the jurors could have concluded Lucero had an opportunity to retreat. Redmond, 150 Wn.2d at 494-95.

Finally, as in Wooten, the jury instructions the court provided could have misled the jury into believing flight was a reasonable alternative to the use of force. The court instructed the jury that use of force in defense of another was justified only if no reasonably effective alternative to the use of force appeared to exist.⁶ CP 57-

⁶ The court instructed the jury that the use of force to defend another is lawful when it is not more than necessary:

It is a defense to a charge of First Degree Assault or Second Degree Assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person whom he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is *necessary*.

58. But the jury was not instructed that Lucero had no duty to retreat as an alternative to using force. Under these circumstances, the jury might have erroneously concluded flight was a reasonable alternative to the use of force. Thus, the court should have instructed the jury that Lucero in fact had no duty to retreat. Wooten, 87 Wn. App. at 826.

iii. Reversal is required. Where a reasonable juror could have concluded that flight was a reasonable alternative to the defendant's use of force, failure to give a "no duty to retreat" instruction is reversible error. Redmond, 150 Wn.2d at 495; Wooten, 87 Wn. App. at 826. Here, a reasonable juror could have concluded Lucero should have fled rather than use force to defend another. Thus, the trial court was required to instruct the jury Lucero had no duty to retreat, and failure to give the instruction was prejudicial error. Reversal is required.

CP 57 (emphasis added). The court then defined necessary as:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) *no reasonably effective alternative to the use of force appeared to exist* and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 58 (emphasis added).

2. THE COURT ERRED IN INCLUDING TWO CALIFORNIA PRIOR CONVICTIONS IN LUCERO'S OFFENDER SCORE

At sentencing, the State alleged Lucero had a California second degree burglary conviction from 1981 and a California possession of controlled substance conviction from 1986, both of which should be included in his offender score. CP 6; 1/17/06RP 2. The court adopted the State's assertion the offender score should be a seven, which included these two prior convictions from California. CP 7; 1/17/06RP 2, 27.

Neither the elements of the California crime of second degree burglary nor the elements of the California crime of possession of a controlled substance are comparable to any Washington felony offense. The State was therefore required to prove, and the court was required to find, that Lucero's actual conduct underlying the prior convictions violated a comparable Washington statute. Moreover, Lucero had a constitutional right to have those facts proved to a jury beyond a reasonable doubt, as the facts were elements of the present offense. Because the record does not show whether a jury found the necessary elements beyond a reasonable doubt, and Lucero did not waive his right to have a jury make those findings, the State was relieved of its

burden of proving the elements. The sentencing court therefore erred in including the prior convictions in the offender score and the sentence must be reversed.

a. The facts necessary to establish an out-of-state conviction is comparable to a Washington offense are essential elements that must be proved to a jury beyond a reasonable doubt.

The Sixth⁷ and Fourteenth⁸ Amendments to the federal constitution ensure a person will not suffer a loss of liberty without due process of law, and guarantee a criminal defendant the right to a jury trial.⁹

U.S. Const. amends. 6, 14. It is now well settled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). "Statutory maximum" means "the maximum sentence a judge may impose *solely on the basis of the facts*

⁷ The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

⁸ The Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law."

⁹ These rights are also protected by the Washington Constitution. Article I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law." Article I, section 21 provides, "The right of trial by jury shall remain inviolate." Article I, section 22 provides, "In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed."

reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (emphasis in original).

The United States Supreme Court has unambiguously reaffirmed that facts increasing the penalty beyond the statutory maximum are essential elements of a criminal offense, even if such facts have traditionally been labeled sentencing factors.

Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, 2552, 165 L.Ed.2d 466 (2006) (citing Apprendi, 530 U.S. at 478). The right to have a jury determine such facts beyond a reasonable doubt derives from their characterization as elements of an offense. Recuenco, 126 S.Ct. at 2552 (citing Apprendi, 530 U.S. at 483-84); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In Washington, a court may increase a person's sentence beyond the statutory maximum if the court finds, by a preponderance of the evidence, that the person has prior criminal convictions. RCW 9.94A.030(14); 9.94A.525; 9.94A.530(1), (2). Prior convictions are incorporated into the defendant's offender score, which is used to determine the length of the sentence. RCW 9.94A.030(14); RCW 9.94A.530(1). Under Apprendi, the mere

existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) (citing State v. Smith, 150 Wn.2d 135, 141-43, 75 P.3d 934 (2003)); Almendarez-Torres v. United States, 523 U.S. 224, 118, S.Ct. 1219, 140 L.Ed.2d 350 (1998). All a sentencing court needs to do is to find the prior conviction exists. State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). Thus, in many cases, judicial fact-finding alone is sufficient to establish the offender score.

Although a court may find, by a preponderance of the evidence, that a prior conviction exists, additional findings may be necessary when the State seeks to include a prior out-of-state conviction in a person's offender score. The Washington Supreme Court has adopted a two-part test to determine whether an out-of-state conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); Lavery, 154 Wn.2d at 255. First, the court compares the elements of the out-of-state crime with the comparable Washington offense. If the elements are comparable, the out-of-state conviction is equivalent to a Washington conviction and may be included in the offender score. Lavery, 154 Wn.2d at 254. But where the elements of the

out-of-state crime are different or broader, the sentencing court must examine the defendant's conduct underlying the prior conviction to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the out-of-state offense. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

Where the elements of the out-of-state conviction are not comparable to a Washington offense, the conviction does not fall under the “prior conviction” exception to Apprendi and the defendant’s constitutional rights to a jury trial and proof beyond a reasonable doubt are implicated. Lavery, 154 Wn.2d at 257. That is because the court must find more than that the prior conviction exists before it can use the conviction to increase the sentence. The court must also determine the nature of the defendant's conduct that led to the prior conviction. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. Because those facts do not fall under the prior conviction exception to Apprendi, but are nonetheless used to enhance the sentence, they are elements of the present

offense. See Recuenco, 126 S.Ct. at 2552 (citing Apprendi, 530 U.S. at 483-84).

Washington courts routinely recognize that facts necessary to establish comparability of a foreign conviction must be proved to a jury beyond a reasonable doubt or admitted by the defendant in a guilty plea. E.g., Lavery, 154 Wn.2d at 257-58; Morley, 134 Wn.2d at 606; State v. Ortega, 120 Wn. App. 165, 172, 84 P.3d 935 (2004); State v. Bunting, 115 Wn. App. 135, 141, 61 P.3d 375 (2003). The task of the court at sentencing for the current offense is to determine, conclusively, that the necessary facts were previously proved to a jury or admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 257-58; Ortega, 120 Wn. App. at 174. If the court cannot determine from the record that the relevant facts were proved to the jury beyond a reasonable doubt, the court cannot include the prior offense in the offender score, as doing so would violate the defendant's due process and jury trial rights. Lavery, 154 Wn.2d at 258; State v. Farnsworth, ___ Wn. App. ___, 130 P.3d 389, 400 (2006).

b. Lucero had a right to have a jury determine, beyond a reasonable doubt, the facts necessary to establish comparability of two of his prior California convictions. The court included two of Lucero's prior California convictions in his offender score: a 1981 conviction for second degree burglary, and a 1986 conviction for Violation of the Uniform Controlled Substances Act, possession of a controlled substance. CP 6-7; 1/17/06RP 2, 27. The statutory elements of the California crimes of second degree burglary and possession of a controlled substance are not comparable to a Washington offense. Therefore, Lucero had a constitutional right to have a jury determine, beyond a reasonable doubt, that he committed particular acts that were not necessary to establish the California offense.

The relevant inquiry in the first step of the comparability analysis is whether the elements of the California offenses are comparable to the elements of a Washington crime in effect at the time of the offenses.¹⁰ Morley, 134 Wn.2d at 605.

i. Second degree burglary offense. At the time of Lucero's 1981 conviction for second degree burglary, California's burglary statute stated, in relevant part,

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle . . . when the doors are locked, aircraft . . . , or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Penal Code § 459. A person commits *second* degree burglary if he commits a burglary in any place other than an inhabited dwelling house, a vessel inhabited and designed for habitation, a trailer coach, or the inhabited portion of any other building. Cal. Penal Code §460.

As the statute provides, in California any entry made with intent to commit larceny or any felony is unlawful. Cal. Penal code §459. In Washington, by contrast, the entry itself must be independently unlawful. RCW 9A.52.010(3); see also State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006).

Moreover, the California burglary statute encompasses conduct that would amount to a misdemeanor in Washington. For instance, entry into a vehicle in California with the intent to commit a crime therein constitutes burglary. Cal. Penal Code § 459. In Washington, unlawful entry into a vehicle, other than a motor home,

¹⁰ The Washington and California statutes have changed since the prior offenses occurred, but not in any way relevant to the issues presented in this case.

with the intent to commit a crime therein is a gross misdemeanor.
RCW 9A.52.100.

Thus, the elements of the California offense of burglary are broader than the elements of the comparable Washington offense in two significant ways: (1) entry into property in California need not be unlawful; and (2) the California statute encompasses a broader range of property.

Thus, in order to prove the California conviction for second degree burglary should be included in Lucero's offender score, the State was required to prove not only that Lucero was convicted of the crime. The State also had to prove that in committing the burglary, Lucero entered a particular kind of structure that is covered by Washington's burglary statute, and also that his entry was independently unlawful. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. Moreover, these facts were elements of the current offense which had to be proved to a jury beyond a reasonable doubt. Recuenco, 126 S.Ct. at 2552.

ii. Possession of a controlled substance offense. The California crime of possession of a controlled substance is broader than the comparable Washington offense in at least one significant respect. In California, a person can be

convicted of the felony offense of possession of a controlled substance if he possesses any amount of “concentrated cannabis.” Cal. Health & Safety Code §§ 11007, 11054(d)(13), 11357, 11362. “Concentrated cannabis” is defined as “the separated resin, whether crude or purified, obtained from marijuana.” Cal. Health & Safety Code § 11006.5.

In Washington, however, possession of forty grams or less of “marijuana” was (and still is) only a misdemeanor. Former RCW 69.50.401(e) (1971) (“any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.”) “Marihuana” is defined in Washington to include the substance California calls “concentrated cannabis”:

“[M]arihuana’ means all parts of the plant of the genus Cannabis L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.

Former RCW 69.50.101 (1984).

Thus, the elements of the California crime of possession of a controlled substance are broader than the comparable Washington offense, as the California statute encompasses a broader range of substances. Thus, in order to prove the possession of a controlled substance conviction should be included in Lucero’s offender score,

the State was required to prove, at least, that Lucero did not in fact possess “concentrated cannabis.” Moreover, Lucero was entitled to have a jury find, beyond a reasonable doubt, this element of the present offense.

c. The court erred in including the two California convictions in Lucero’s offender score. The relevant facts necessary to establish the comparability of Lucero’s prior California convictions were elements of the current offense that had to be proved to a jury beyond a reasonable doubt. Although Lucero’s jury trial right might be satisfied if the facts had been proved to the previous jury or admitted in a guilty plea, the State presented no evidence and the court made no finding that the facts had been so proved.¹¹ If those facts were never proved to a jury beyond a reasonable doubt, Lucero’s constitutional right to a jury trial was violated. Because he did not knowingly, intelligently and voluntarily waive his right to a jury, the sentence must be reversed.

i. A court may not include a foreign conviction in an offender score without determining conclusively the relevant facts were proved to a jury or admitted by the defendant in a guilty plea. The sentencing court may engage in limited fact-finding to

¹¹ In fact, the court acknowledged the State had not presented the records for the California convictions. 1/17/06RP 17.

determine the factual comparability of a foreign offense. Lavery, 154 Wn.2d at 258. However, this determination must be restricted to the facts admitted by the defendant in a guilty plea or found by a jury. Id.; Shepard v. United States, 544 U.S. 13, 25-26, 161 L.Ed.2d 205 (2005). Given these concerns, the Court in Shepard held the sentencing court is limited to considering only documents that show the prior convictions “necessarily” rested on particular facts. 544 U.S. at 24. Thus, if the prior conviction resulted from a guilty plea, the State must present not only the charging document, but also the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea is confirmed by the defendant. 544 U.S. at 26. In a jury trial, the State must present jury instructions that ensure the court the jury was charged with the duty to determine that certain facts existed beyond a reasonable doubt. 544 U.S. at 25 (plurality opinion); see also Ortega, 120 Wn. App. at 172; Lavery, 154 Wn.2d at 842 (sentencing court must be able to ascertain with certainty the specific facts admitted by defendant or proved to finder of fact beyond a reasonable doubt).

If the court cannot determine from the record that the relevant facts were proved to the jury beyond a reasonable doubt,

the court cannot include the prior offense in the offender score, as doing so would violate the defendant's due process and jury trial rights. Lavery, 154 Wn.2d at 258; Farnsworth, 130 P.3d at 400; Ortega, 120 Wn. App. at 174.

In this case, the sentencing court included the two foreign convictions in Lucero's offender score, although the State presented no evidence, and the court made no finding, regarding the relevant facts underlying the prior convictions. Thus, it is impossible to know whether those facts were ever admitted by Lucero in a guilty plea or proved to a jury beyond a reasonable doubt. If they were not, then inclusion of the prior convictions in the offender score violated Lucero's constitutional right to have those facts proved to a jury beyond a reasonable doubt. Because Lucero did not waive his right to a jury trial, the sentence must be reversed.

ii. The sentence must be reversed, as Lucero did not waive his constitutional right to a jury trial. The right to a jury trial, like other constitutional rights of the accused, may be waived so long as the waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). There must be an affirmative showing on the record that the waiver of the right

to a jury trial was made knowingly, intelligently and voluntarily.

State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The burden to establish waiver is on the prosecution. Boykin, 395 U.S. at 242.

In addition, in Washington, the right to trial by jury is recognized as a personal right that cannot be waived by a person's attorney. State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994). The defendant must utter a personal expression of waiver. Id. at 725 (citing Bellevue v. Acrey, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984); State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979); State v. Brand, 55 Wn. App. 780, 785 n.5, 780 P.2d 894 (1989)). In Wicke, an attorney's oral stipulation as the defendant stood beside him in open court was not sufficient to establish waiver. 91 Wn.2d at 645. The Supreme Court has refused to infer a waiver when the record shows less than an affirmative, unequivocal waiver by defendant. Acrey, 103 Wn.2d at 207. Even where the defendant is fully aware of the right to a jury trial, such knowledge alone is insufficient; the record must show the defendant expressly waived that right. Id.

A reviewing court must indulge every reasonably presumption against the validity of an alleged waiver of a constitutional right. Zerbst, 304 U.S. at 464; Wicke, 91 Wn.2d at 645. The Court does not “presume acquiescence in the loss of fundamental rights.” Zerbst, 304 U.S. at 458.

In the Arizona case of State v. Brown, the defendant pled guilty to the base offense and made statements at his guilty plea hearing that tended to establish aggravating factors. State v. Brown, 129 P.3d 947, 2006 Ariz. LEXIS 25 (Ariz. 2006). The court rejected the State’s contention the statements could be deemed “facts . . . admitted by the defendant” for purposes of Apprendi and Blakely. Id. at 952. The court concluded

It is therefore clear that a defendant's "admission" of an element of an offense during a judicial hearing does not affect his Sixth Amendment right to jury trial with respect to that element. Because an aggravating circumstance is the "functional equivalent of an element," Apprendi, 530 U.S. at 494, no different Sixth Amendment principle should apply in that context. Thus, the Supreme Court's statement in Blakely that "*facts . . . admitted by the defendant*," 542 U.S. at 303, need not be found by a jury can only logically be read to mean facts admitted as part of a guilty plea - the elements of the offense to which the defendant has admitted guilt and waived his right to jury.

Id.

In this case, defense counsel did not object to the classification of the California convictions. The court accepted the State's assertions that the offenses were comparable without obtaining a knowing, intelligent and voluntary waiver from Lucero. Lucero made no statement at the sentencing hearing regarding whether he personally waived his right to a jury determination of the factual comparability of the foreign convictions. In assessing whether a defendant has waived his right to a jury trial, "every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary." Wicke, 91 Wn.2d at 645. The facts in this case do not comply with the general requirement of waiver set forth in Boykin and in the Washington cases that hold the right to a jury trial is a personal right that cannot be waived by a person's attorney.

Because Lucero did not personally waive his right to a jury determination of factual comparability, the trial court erred in relying on the prior conviction in imposing the sentence. The sentence must be reversed. See Wicke, 91 Wn.2d 638; Acrey, 103 Wn.2d 203.

iii. State v. Ross does not compel a different outcome. In State v. Ross, several consolidated defendants challenged the State's failure to prove their out-of-state convictions were comparable to Washington felonies. 152 Wn.2d 220, 224, 95 P.3d 1225 (2004). At sentencing, their lawyers affirmatively acknowledged out-of-state convictions should be included in the offender score although the State did not prove the crimes were comparable to felonies in Washington. Id. at 225-27. The court concluded that although generally the State bears the burden of proving the existence and comparability of out-of-state prior convictions, a defendant's "affirmative acknowledgement" that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements. Id. at 230, 233 (citing Ford, 137 Wn.2d at 483 n.5).

Under the SRA, the trial court may rely at sentencing on facts that are admitted or acknowledged by the defendant or his attorney, without further proof. RCW 9.94A.530(2). But where a Blakely fact is concerned, the question is not simply whether the defendant "admitted" or "acknowledged" that fact, but whether he did that *and* knowingly, voluntarily, and intelligently waived his Sixth Amendment right to a jury trial. State v. Hochhalter, 131 Wn. App.

506, 523, 128 P.3d 104 (2006). Where the record does not show that the defendant was informed of, much less intended to relinquish, his right to have a jury decide a fact, and where, on the contrary, it shows only that his counsel did not disagree with the State's assertion of the fact, counsel's actions do not amount to a valid waiver. Hochhalter, 131 Wn. App. at 523-24.

Moreover, defense counsel's actions in this case were insufficient to establish waiver, even under Ross. Where a defendant does not dispute the classification of a foreign conviction at sentencing, but does not affirmatively acknowledge it, he may raise the issue on appeal. State v. Jackson, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005) (citing Ford, 137 Wn.2d at 477-78; State v. Hunter, 116 Wn. App. 300, 302, 65 P.3d 371 (2003), aff'd by Ross, 152 Wn.2d 220). In Hunter, at the time the defendant entered his guilty plea, he disputed the State's assertion that his offender score was "5," based on five out-of-state convictions. At sentencing, the State acknowledged it was unable to prove that one of the five out-of-state convictions was comparable to a Washington felony and that the defendant's offender score was therefore "4." In response, defense counsel expressly conceded that the only other conviction Hunter was challenging was properly included in his offender score.

Defense counsel also acknowledged that the State had properly calculated Hunter's standard range. Hunter, 116 Wn. App. at 302. On appeal, this Court stated, "[b]ecause the defense affirmatively acknowledged the correctness of the State's classification of the out-of-state convictions, the sentencing court properly included the convictions in Hunter's offender score." Id.

In Jackson, the court rejected the State's contention that defense counsel "affirmatively acknowledged" the classification of an out-of-state offense when counsel acknowledged the State's assertion of the standard range. 129 Wn. App. at 107. The court held that because the discussion of the standard range occurred in the context of a merger argument regarding the current convictions, and the defense did not affirmatively acknowledge the classification of Jackson's Oregon conviction, counsel's actions did not amount to a waiver. Id.

Similarly, here, counsel never affirmatively acknowledged Lucero's prior California convictions were comparable to Washington offenses. Counsel's reference to the standard range occurred in the context of a discussion of whether one of the prior convictions had washed out. 1/17/06RP 6. Nowhere did the parties or the court address the issue of whether the foreign

convictions were comparable to Washington offenses. Thus, counsel did not “affirmatively acknowledge” the State’s assertions of comparability, but merely failed to object. See Ross, 152 Wn.2d at 233 (failure to object to State’s offender score calculation based in part on prior out-of-state convictions does not amount to affirmative acknowledgement of comparability of such convictions). Thus, the issue may be raised on appeal.

F. CONCLUSION

Because the erroneous jury instructions relieved the State of its burden of proving Lucero did not act in defense of another, the conviction must be reversed. Alternatively, because the State failed to establish the facts necessary to prove the comparability of two prior foreign convictions were proved to a jury beyond a reasonable doubt or admitted in a guilty plea, the sentence must be reversed.

Respectfully submitted this 28th day of September 2006.

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